

A.F.R.

Court No. - 11

Case :- APPLICATION U/S 482 No. - 216 of 2023

Applicant :- Brijeash Saurabh Mishra @ Brijesh Mishra

**Opposite Party :- State Of U.P. Thru. Prin. Secy. Home Lko.
And Another**

Counsel for Applicant :- Manoj Kumar Misra

Counsel for Opposite Party :- G.A.

Hon'ble Rajesh Singh Chauhan,J.

Heard Sri Manoj Kumar Misra, learned counsel for the applicant and Sri Rajesh Kumar Singh, learned AGA for the State.

By means of this application filed under Section 482 Cr.P.C., the applicant has prayed following main reliefs:-

"For the facts, reason and circumstances as stated in accompanying affidavit it is most respectfully prayed before this Hon'ble Court that it may kindly be pleased to set aside the order dated 17.11.2022 passed in Session Trail no.70/2015 State Vs. Brijesh Saurabh Mishra and others, arising out Crime No.237/2013, Under Section 2/3 U.P. Gangster Act concerning police station Antu District Pratapgarh pending in the Court of Additional Session Judge Court No.05, Pratapgarh by means of which he has closed the opportunity of cross examination for the applicant and also set aside the order dated 25.11.2022 passed by Additional Sessions Judge, court no.05 Pratapgarh in aforesaid case and direct Leaned Court below to recall the witness and allow the applicant to cross examine him in the interest of justice.

It is further prayed before this Hon'ble Court that it may kindly be pleased to stay further proceeding in aforesaid case, during the pendency of this case in interest of justice."

The precise contention of the learned counsel for the applicant is that the learned trial court vide order dated 17.11.2022 recorded the chief statement of one PW-11, Uma Shankar Tripathi. On that, particularly at that point of time, counsel for the applicant was busy in another court, therefore, one application was filed on his behalf to adjourn the case as his counsel was not able to cross-examine PW-11 Uma Shankar Tripathi. Learned trial court rejected the said application for the reason that the counsel for the present applicant had not

indicated about the court where he was busy.

Since no adjournment of any kind whatsoever was sought earlier to cross-examine PW-11, rather the chief-examination of the said witness was recorded on 17.11.2022, therefore, at least, one short time should be given to the counsel for the applicant in terms of Section 273 Cr.P.C., which clearly provided that except as otherwise expressly provided, all evidence taken in the court of the trial or other proceedings shall be taken in the presence of the accused or when his personal attendance is dispensed with, in the presence of his pleader. On the strength of aforesaid legal proposition, the present applicant has filed an application dated 25.11.2022 (Annexure No.5) under Section 311 Cr.P.C. to recall the order dated 17.11.2022 and to provide one opportunity to cross-examine PW-11. By means of order dated 25.11.2022 (Annexure No.6), learned trial court rejected the said application indicating therein that the cases relating to MP/MLA should be disposed of with expedition in terms of directions being issued by the Hon'ble High Court and said matter was old, therefore, adjournment was not possible. Learned trial court has also indicated that the counsel had not indicated in his application about the court where he was busy. Therefore, the ground of business of any Advocate on particular date may not be a good ground to adjourn the case.

Sri Misra has stated that had this case been in a nature that frequent adjournment had been sought from the side of the present applicant, the observation of the learned trial court would have been appropriated but in the present case, admittedly, on the date when the chief-examination of PW-11 was recorded, the opportunity of cross-examination of such witness has been closed by the learned trial court. The aforesaid exercise is violative of Section 273 Cr.P.C. Therefore, he has requested that quashing the orders dated 17.11.2022 and 25.11.2022, the present applicant may be afforded an opportunity to cross-examine PW-11.

Learned AGA has opposed the aforesaid request and has submitted that PW-11 has only proved chik FIR and if he has not been cross-examined by the applicant, the applicant might have not suffered any irreparable loss and that may not be considered as miscarriage of justice to the present applicant, therefore, the orders dated 17.11.2022 and 25.11.2022 passed by the learned trial court need no interference.

Heard learned counsel for the parties and perused the material available on record.

This is trite law as well as it has got statutory prescription under

Section 273 Cr.P.C. that all evidences taken in the court of trial or other proceedings shall be taken in the presence of the accused or if his personal attendance is dispensed with, in the presence of his pleader. That statutory prescription may not be avoided. Besides, this is not a case where the frequent adjournments have been sought from the side of the present applicant, rather it was the first application for adjournment filed on 17.11.2022 when the chief-examination of PW-11 has been recorded and on the same date, such opportunity has been closed without giving any short adjournment, therefore, the same may not be considered as a proper exercise being carried out by the learned trial court. Learned counsel might have been busy in another court at particular point of time and if such application was filed before the learned court below, that application should have been considered properly in the light of statutory prescription of Section 273 Cr.P.C. vis-a-vis in the light of the fact that the cross-examination of a witness is a right of the other side. Such right may be denied only in exceptional circumstances or in such circumstances where the order sheet reveals that the other side/ party is habitual in seeking adjournments for one reason or another.

Therefore, in view of the facts and circumstances, considered above, I am of the considered opinion that the impugned orders dated 17.11.2022 and 25.11.2022 have not been passed properly, therefore, both the orders are set aside.

Learned trial court is directed to provide one opportunity to the present applicant/ his counsel to cross-examine PW-11 fixing a single date, may be a short date, and if on that date, said prosecution witness could not be examined for any lapse on the part of the present applicant, any appropriate orders may be passed indicating the reason. Since the trial in question is of 2015, therefore, the precaution to that effect, which has been taken by the learned trial court, is appreciated, but in the light of such precaution, a single opportunity to cross-examine PW-11 may not be denied.

Accordingly, the application is **allowed**.

[Rajesh Singh Chauhan,J.]

Order Date :- 16.1.2023

RBS/-